



No. 83-1112

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

vs.

CATARINO MURILLO,

Defendant and Appellant.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit.

SUPPLEMENTAL BRIEF.

ROGER AGAJANIAN,
924 North Lowell Street,
Santa Ana, Calif. 92703,
(714) 558-9292,

*Attorney for Defendant and
Appellant.*

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Petitioner, respectfully requests that the recent changes in the law by United States Supreme Court case law be included with Petitioner's original Petition for Writ of Certiorari as it relates to Issue III.

Petitioner twice moved to dismiss the criminal charges involving distribution of heroin (CT 1-5) in the District Court. The motions were based primarily on the controlling decision in the circuit at the time, *United States v. Mendez-Rodriguez*, 450 F.2d 1 (1971). Petitioner believes the trial record in the case clearly establishes a violation of the then-controlling rule. However, after the trial but before the Circuit court heard the Appeal, this Court's decision in *United States v. Valenzuela-Bernal*, ____ U.S. ___, 102 S.Ct. 3440 voided the Ninth Circuit's earlier decision. On the Appeal, the Circuit court ruled Petitioner failed to prove that the deported witnesses had material, favorable evidence to give and rejected Petitioner's argument.

Petitioner contends that in fact the record does show the required prejudice and that if it does not, he is entitled to have an opportunity to prove the materiality and favorable nature of deported witnesses' testimony.

Prejudice.

The record shows the seven (7) witnesses were deported at a time the government knew or should have known they were percipient witnesses. One was an alleged co-defendant in Count II of this indictment. Others were directly involved in the transactions alleged as overt acts in the conspiracy (Count I). The record in this case shows Petitioner was a suspect for over six (6) years before he was indicted. During that time the government prosecuted or employed or interviewed or surveilled all seven (7) of the deported witnesses plus two (2) other persons, Simon Meza and Ramon Ochoa. These last two became government witnesses, implicating defendant and the other seven. Petitioner contends that the records support a reasonable inference that the government selected the two out of nine possible witnesses and sent the other seven to Mexico. These seven would not give evidence favorable to the government or else they too would have been enlisted as government witnesses in return for some barter or deal (as were the two who did testify). The inference is inescapable that here the deported witnesses would have (a) had material evidence (since they are percipient witnesses to the events critical to the government's case) and (b) the evidence would not have been favorable to the government. If even one witness fits this conclusion, Petitioner contends the prejudice requirement of *Valenzuela-Bernal* has been met.

Remand.

This Court has suggested in *Valenzuela-Bernal*, *supra*, that the *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342, test for motions for new trials is appropriate

for evaluating deportation due process claims.

Petitioner contends he is at least entitled to have his case remanded for the purpose of offering additional evidence of the specific nature of the favorable material evidence which the deported witnesses could have given if not deported. Their opportunity would enable the trial Court to consider the evidence in the case and weigh the prejudice to Petitioner. Moreover, Petitioner has never had such an opportunity since at all times before the Appeal, Petitioner, his Counsel and the United States Attorney relied on *Mendez-Rodriguez* which had been the law in the Circuit for ten (10) years at the time.

Petitioner contends that since the government's entire case (on CT 1-5) rests exclusively on the testimony of two witnesses who themselves were either paid informants, convicted felons or both, it is probable that his motion for a new trial and for dismissal will be granted if he is permitted to offer evidence to prove the government deported witnesses who could give material favorable evidence as required by *United States v. Valenzuela-Bernal, supra*, and the subsequent decisions of the Ninth Circuit implementing that holding, *United States v. Marguey*.

Dated: January 27, 1984.

Respectfully submitted,

ROGER AGAJANIAN,

Attorney for Defendant and

Appellant.